

## SPICe Briefing

# Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill

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The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill proposes to reform the legislation governing Fatal Accident Inquiries (FAIs). It implements those recommendations from the Cullen Review (2009) which require primary legislation and with which the Scottish Government agrees.

The Bill's main proposals are:

- updating the definitions which control when a mandatory FAI must be held
- enabling FAIs to be held where a person resident in Scotland dies abroad and their body is repatriated to Scotland
- requiring the Lord Advocate, on request, to give written reasons for a decision not to hold an FAI
- requiring a preliminary hearing to be held in advance of an FAI with the intention of tackling delays
- creating an obligation to respond to a sheriff's recommendation and requiring the Scottish Courts and Tribunals Service to publish responses

This briefing also looks at Patricia Ferguson MSP's proposals for a Member's Bill on this subject.



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## EXECUTIVE SUMMARY

### Introduction

The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill is a Government Bill, introduced on 19 March 2015. The Justice Committee is the lead committee at Stage 1.

### Background

Fatal Accident Inquiries (FAIs) are held to establish the circumstances surrounding certain deaths. They are presided over by sheriffs. The sheriff may make recommendations to prevent future deaths in similar circumstances.

Under the current law, mandatory FAIs must be held where someone dies in legal custody, or someone dies in an accident related to their work.

An FAI can also be held where a death is sudden, suspicious, unexplained or gives rise to serious public concern. The Lord Advocate (through the Crown Office and Procurator Fiscal Service, or COPFS) has discretion to hold an FAI in these circumstances where he decides it is “expedient in the public interest”.

The Lord Advocate also has discretion not to hold an FAI (even a mandatory FAI) if the circumstances of the death have been adequately established in related criminal proceedings.

Around 50 to 60 FAIs are held each year. COPFS carries out investigations into the circumstances of deaths in significantly more cases – approximately 5,500 each year.

### Human rights considerations

Article 2 of the European Convention on Human Rights creates a right to life. The European Court of Human Rights has interpreted this to include a duty on states to investigate loss of life in certain circumstances. There are procedural standards which such investigations must meet, but it is otherwise up to individual governments to decide how the right should be implemented.

### The Cullen Review

Lord Cullen was asked by the Scottish Government to conduct a review into FAI legislation. The [review report](#) was published in 2009. Several administrative recommendations flowing from the review have already been implemented. Those requiring primary legislation – and with which the Scottish Government agrees – are being implemented by this Bill.

There are several Cullen Review recommendations which the Scottish Government did not support. These are not being implemented. They can be summarised as follows:

- **Mandatory FAIs** – the Bill will not extend the mandatory categories to include those who are subject to compulsory detention by a public authority at the time of death, or to children who die in a residential establishment (except where they are in secure accommodation).

- **Delays** – the Bill will not require an early hearing (which it was suggested should be within three months of the death) in relation to mandatory FAIs.
- **Legal aid** – the relatives of the deceased will still be required to demonstrate that it is reasonable for them to receive legal aid before any application will succeed.
- **Publicising sheriffs' recommendations** – Lord Cullen's recommendations on this subject will be followed in part: however, responses to recommendations will be published by the Scottish Courts and Tribunals Service (SCTS).

### **Patricia Ferguson's Member's Bill**

Patricia Ferguson MSP has secured the right to introduce a Member's Bill reforming FAI legislation. A final bill has not yet been put forward. She proposes the following changes:

- extending the mandatory categories of FAI to cover all work-related deaths (including those from industrial diseases and exposure to hazardous substances) as well as some other categories
- requiring the Lord Advocate to give written reasons for a decision not to hold an FAI
- creating time limits for the Lord Advocate to apply for FAIs to speed up the process
- strengthening the process for sheriffs' recommendations, including making them legally enforceable in certain circumstances, and
- clarifying the role of FAIs in preventing future deaths.

### **The Scottish Government Bill**

The main areas where the Scottish Government proposes to reform the law are as follows:

- **Mandatory FAIs** – updating the definition of legal custody to include any death while detained by the police and requiring a mandatory FAI where a child dies in secure accommodation.
- **Discretionary FAIs** – enabling an FAI to be held where a Scottish resident dies outside the UK and their body is repatriated to Scotland.
- **Role of the Family** – requiring the Lord Advocate, on request, to give written reasons for a decision not to hold an FAI.
- **Delay** – introducing a requirement to hold a preliminary hearing in advance of an FAI and encouraging the sharing and agreeing of evidence in advance.
- **Sheriffs' recommendations** – creating an obligation to respond to a sheriff's recommendation and requiring SCTS to publish responses.
- **Other matters** – more freedom in choice of location and venue for an FAI; allowing FAIs to be re-opened or reconvened; and enabling sheriffs to be designated as specialists.

## INTRODUCTION

The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill was introduced in the Scottish Parliament on 19 March 2015 by Michael Matheson MSP. It is a Government Bill. The [Bill as introduced](#) is accompanied by a [Policy Memorandum](#) and [Explanatory Notes](#).

The purpose of the Bill is to modernise the law surrounding the holding of Fatal Accident Inquiries (FAIs) in Scotland. It implements, broadly, the recommendations of the [Review of the Fatal Accident Inquiry Legislation](#) (2009), led by Lord Cullen (henceforth “the Cullen Review”). Some recommendations from that review were not supported by the Scottish Government and therefore do not form part of the Bill. Some recommendations directed at the Crown Office and Procurator Fiscal Service (COPFS) have already been implemented.

The Scottish Parliament’s Justice Committee has been designated the lead committee at Stage 1. The Justice Committee has issued a [Call for Evidence](#), which closed on Tuesday 28 April.

## BACKGROUND

### ROLE OF THE LORD ADVOCATE

The Lord Advocate is the most senior law officer for the Scottish Government. He advises the Scottish Government in civil and criminal legal matters. He is also responsible for the prosecution of crime and the investigation of deaths in Scotland.

The Lord Advocate is supported in his role by COPFS. Procurators fiscal prosecute crime. They also have a long-standing, traditional role in investigating deaths in Scotland. Death investigations may take place even where there is no expectation that a death is the result of criminal behaviour, or that an FAI will take place.

Procurators fiscal lead evidence at FAIs on behalf of the Lord Advocate. Decisions to be made by the Lord Advocate are often delegated to COPFS.

### FATAL ACCIDENT INQUIRIES – THE CURRENT LAW

The current law governing FAIs is to be found in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The Bill does not propose to radically change the law, but it would modernise and expand it in some areas. The 1976 Act will be entirely replaced.

#### When an FAI is held

An FAI – known as a mandatory FAI – must be held where a death occurs in Scotland:

- as a result of a work-related accident, or
- when the deceased was in legal custody at the time of their death.

The Lord Advocate also has the discretion to hold an FAI into a death which is sudden, suspicious, unexplained or has occurred in circumstances which give rise to serious public concern. He can do this where such an inquiry would be “expedient in the public interest”.

The Lord Advocate can decide not to hold an FAI – even a mandatory one – where he is satisfied that the circumstances of death have been sufficiently established in related criminal proceedings. The Lord Advocate can also decide not to hold an FAI in such circumstances

where inquiries have been carried out by the Health and Safety Executive, the Office of Nuclear Regulation, or under the Gas Act 1965.

Section 9 of the 1976 Act specifically extends the FAI regime to deaths relating to natural resource extraction in the North Sea<sup>1</sup>. This means that deaths relating to accidents in the oil and gas sector are usually investigated through an FAI.

## **How an FAI is conducted**

The procurator fiscal for the district most closely connected to the circumstances of the death is responsible for carrying out an investigation and for presenting evidence about the event to the FAI. A sheriff presides over the FAI.

The spouse of the deceased, or the nearest relative, is also entitled to present evidence and cross-examine witnesses at an FAI. An employer can also participate where appropriate, as can other interested parties with the permission of the sheriff.

There are specific procedural rules which apply to FAIs – the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977. However, the 1976 Act also makes provision for civil court rules (the “Ordinary Cause Rules”) to apply to proceedings in relation to matters such as contempt of court and the attendance of witnesses.

It is generally considered that an FAI is an “inquisitorial” process. This means that the sheriff’s role is to establish the facts, rather than to apportion blame or to find fault. However, Lord Cullen was keen to put this into context in his review (2009). He stated (paragraph 3.23):

“It is true that an investigation of the circumstances of a death in an FAI may disclose grounds for criticism, from which a basis for alleging fault may be inferred. That may be unavoidable if the FAI is to fulfil its function of investigating the circumstances of the death.”

The inquisitorial nature of an FAI differentiates it from criminal proceedings, where the object is to establish whether the accused is guilty of a crime. It also differs from civil proceedings<sup>2</sup>, which will often entail a finding of fault – e.g. of negligence which caused a personal injury or of a breach of contract. Criminal and civil proceedings are generally described as “adversarial”.

## **What an FAI establishes**

The role of an FAI is set out in the 1976 Act. It is to establish, so far as is possible:

- where and when the death, and any accident resulting in the death, took place
- the cause(s) of death and any accident resulting in the death
- whether there were reasonable precautions which could have been taken to avoid the death
- whether there were any defects in any “system of working” which contributed to the death, and
- any other facts which are relevant to the circumstances of the death.

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<sup>1</sup> The 1976 Act specifically covers those parts of the UK Continental Shelf to which the law of Scotland applies.

<sup>2</sup> Civil proceedings establish legal rights and obligations. Examples include obligations under a contract, between a landlord and tenant and divorce.

The sheriff in charge of the FAI makes a determination covering as many of these matters as are relevant in the circumstances. Determinations which are of public interest or relate to a significant point of law are currently published on the [Scottish Courts and Tribunals Service's \(SCTS\) website](#).

In-keeping with its inquisitorial nature, it is not possible to appeal a decision in relation to an FAI – for example the findings of the sheriff or a decision by the Lord Advocate not to hold an FAI. However, such decisions can be the subject of a judicial review.

Judicial review looks only at the procedural aspects of an official decision. It is, broadly, possible to challenge a decision by way of judicial review where it is argued that:

- the decision-maker acted unlawfully
- there was procedural unfairness in reaching the decision, or
- the decision was so unreasonable as to be irrational.

The SPICe briefing [Judicial Review](#) (Harvie-Clark 2009) provides more information.

### **How an FAI relates to other court proceedings**

The sheriff's determination in an FAI is not admissible in evidence in any other court proceedings which flow from the death. An example might be a civil claim for compensation as a result of negligence.

However, the evidence led at an FAI is in the public domain and can therefore be used in other court proceedings. For example, evidence led at an FAI may be used to challenge alternative claims made in a negligence case. An FAI may also establish facts which can then be used to decide whether a civil court case should be pursued.

The fact that someone has given evidence at an FAI does not prevent criminal charges being brought against them. However, no witness at an FAI can be compelled to answer any questions which might imply that they are guilty of a criminal offence. This, some commentators argue, limits the usefulness of holding an FAI before any criminal proceedings have been concluded.

FAIs are not usually held until after any related criminal proceedings have been concluded. The fact that the Lord Advocate can decide not to hold an FAI where the circumstances of death have been adequately established in criminal proceedings is a significant factor in this practice.

## Statistics

According to the Policy Memorandum (paragraph 8), approximately 11,000 deaths are reported to the Procurator Fiscal each year. Death investigations are carried out by COPFS in roughly half of these cases – approximately 5,500.

Of these, around 50 to 60 progress to an FAI each year. It is thought (Cullen 2009) that sheriffs make recommendations relevant to other people or organisations in about one third of FAIs – or approximately 20 FAIs per year.

## DEATHS OF SERVICE PERSONNEL ABROAD

The 1976 Act did not originally contain any legal power for the Lord Advocate to investigate deaths which occurred outside Scotland. This became a particular issue during the Iraq and Afghanistan Wars.

Coroner's Inquests – under the English system of investigating deaths – were held when the bodies of service personnel who had been killed in the conflicts were repatriated to the UK. This was because repatriation was always to the RAF bases at Lyneham and Brize Norton in the south of England. The families of Scottish-based service personnel had to travel to England if they wished to attend the hearings. A [Guardian article](#) provides more information.

The Coroners and Justice Act 2009, enacted by the Westminster Parliament, enabled the deaths of service personnel abroad to be investigated under the FAI system.

It applies to those on active service abroad, those engaged in activities to support active service as well as certain civilians involved in military activities. Where such a person's body is in Scotland or is expected to be repatriated to the UK, the Secretary of State can notify the Lord Advocate that it may be appropriate to hold an FAI. Where such a person's body is in England or Wales, the Chief Coroner can make the same notification. Equally, the Secretary of State, or the Chief Coroner, can decide that a Coroner's Inquest is more suitable.

The 2009 Act also amended the 1976 Act to create parallel powers to investigate deaths of service personnel which happen abroad. The Lord Advocate has discretion to hold an FAI where:

- the death occurred in legal custody, or
- the death was sudden, suspicious, unexplained or occurred in circumstances such as to give rise to serious public concern.

Otherwise, the usual rules, described above, apply to proceedings.

## OTHER INVESTIGATIONS INTO DEATHS

A range of organisations have a role in investigating deaths in Scotland. The roles of the main agencies are summarised below.

It should be noted that many deaths result from a known medical condition and are expected. These would not normally be the subject of further investigation unless there were other concerns about the circumstances of the death. However, deaths in legal custody are always the subject of an FAI, even where they result from a known medical condition.

## **Crown Office and Procurator Fiscal Service**

COPFS, acting on behalf of the Lord Advocate, investigates a large number of deaths every year in the public interest. As noted above, of around 5,500 death investigations per year, only 50 to 60 result in FAIs. Investigations are carried out by a specialist unit within COPFS known as the Scottish Fatalities Investigation Unit. This unit was established as a result of recommendations made in the Cullen Review.

In carrying out its investigations, COPFS will usually review evidence, such as post-mortem and other medical reports. Statements may also be taken from witnesses. Once the evidence has been collected, COPFS will make decisions about how to proceed, such as whether criminal charges should be pursued or whether an FAI should be held.

It is understood (Scottish Government 2015) that family members are given a point of contact in the procurator fiscal's office so that they can raise any issues or concerns directly. COPFS states (Scottish Parliament Public Petitions Committee 2014) that family members have access to the key evidence and input into the decision about whether to hold an FAI. The decision about whether or not to hold an FAI will be explained to the family. In addition, families have access to victim information and advice officers employed by COPFS, who can provide information about the FAI process.

## **Health and Safety Executive**

The Health and Safety Executive (HSE) has a policy of investigating all fatal work-related accidents unless there are specific reasons for not doing so (HSE 2009). However, the HSE will not always be the appropriate agency to carry this out. In particular, local authorities have responsibility for enforcing health and safety obligations in relation to some premises, including offices, shops, hotels and food outlets.

Investigations are carried out to decide:

- what caused the accident
- whether action should be taken to prevent a recurrence or to ensure compliance with the law
- whether existing law or guidance could be improved, and
- what response is appropriate to deal with any breach of the law

Investigations can involve visiting the scene of the accident, collecting physical evidence and taking witness statements.

Prosecutions in Scotland (unlike in England) can only be carried out by the procurator fiscal in the public interest. It will therefore be up to the procurator fiscal, rather than the Health and Safety Executive, whether criminal charges are actually brought. Evidence collected by the Health and Safety Executive – and any conclusions drawn from it by investigators – may also be presented to an FAI.

The HSE may, separately, hold an inquiry into particular incidents or matters of health and safety. Where such an inquiry has been held in relation to a work-related death in Scotland, the Lord Advocate can decide not to also hold an FAI.

## **Healthcare situations**

### *NHS bodies*

NHS boards carry out “adverse event reviews” where there are concerns about the circumstances of a death. Their purpose is to discover if any lessons for future practice can be learned. In many cases, the fact of the death will also be reported to the procurator fiscal, who may carry out a separate investigation.

NHS boards set their own policies in relation to adverse event reviews so practice varies from area to area. Healthcare Improvement Scotland has an active role in reviewing deaths from suicide and promoting any lessons learned across the NHS.

### *Social care bodies*

Local authorities have systems in place to review some deaths, through a critical incident review or multi-agency review type process. However, the approach is not standardised.

The Care Inspectorate regulates social care, social work and child protection services. It is a legal requirement that the death of a person using a care service is reported to the Care Inspectorate. In many cases, the death will also be reported to the procurator fiscal, who may carry out a separate investigation.

### *Mental Welfare Commission for Scotland*

The Mental Welfare Commission for Scotland is an independent organisation which works to support the rights of people with mental illness, learning disability and related conditions. It has statutory powers to carry out investigations or hold inquiries where there are concerns about the care or treatment of somebody with a mental illness, learning disability or related condition. Such investigations can be carried out during the lifetime of the person concerned as well as after a death.

## **Deaths of children**

Depending on where a child died, there may be a review by a healthcare or social care body. As noted above, these procedures are not standardised.

The Care Inspectorate has a legal duty to review deaths of children who are “looked after” by their local authority. This covers children who are being cared for by foster parents, kinship carers, prospective adopters or in residential accommodation provided by the local authority. Some children may need residential care because of complex disabilities. Children who live at home may also be “looked after” if they are under the supervision of the social work department.

Where the death of a child results from abuse, the local authority will carry out a “significant case review”. There are systems in place to disseminate lessons learned from such reviews more widely. NHS boards organise reviews into cot death situations, and Healthcare Improvement Scotland co-ordinates all findings.

## **HUMAN RIGHTS CONSIDERATIONS**

The Human Rights Act 1998 created a duty on public authorities (including the Scottish Government, local authorities and NHS boards) to respect human rights. The Human Rights Act 1998 Act incorporated the [European Convention on Human Rights](#) into the law of the UK. The Scotland Act 1998 also requires the Scottish Parliament and Scottish Government to act in a manner which was compatible with Convention rights.

Article 2 of the Convention provides that “Everybody’s right to life shall be protected by law.” Force which could result in the loss of life should only be used where “absolutely necessary”.

The European Court of Human Rights has interpreted this obligation to include a requirement on the state to investigate loss of life in certain circumstances. This is considered necessary to make the guarantees in Article 2 effective. It enables enforcement of laws which protect the right to life and ensures agents of the state are accountable for deaths for which they are responsible.

The European Court of Human Rights has also established standards which investigations must meet if they are to discharge the procedural obligation to investigate deaths. It is otherwise up to individual governments to decide how the right should be implemented. Different standards of investigation may be appropriate to different types of deaths. The requirements are that an investigation must<sup>3</sup>:

- be independent
- be effective
- be reasonably prompt
- allow for sufficient public scrutiny, and
- involve the next of kin to an appropriate extent.

In line with the Article 2 requirements, the requirement to investigate particularly applies when the state has a role in the loss of life. Thus, it is generally considered that deaths in custody and deaths at the hands of state agents (such as security forces) must be investigated. Recent Scottish case law has held that Article 2 obligations can apply to healthcare settings in certain circumstances.<sup>4</sup>

## THE CULLEN REVIEW

In 2008, the Scottish Government announced that it had asked Lord Cullen (a previous Lord President of the Court of Session) to conduct a review into FAI legislation. The review included a consultation, to which a range of people and organisations responded. More information about the consultation and the responses to it is available from the [Scottish Government’s website](#).

The [review report](#) was published in 2009. It contained a number of recommendations to modernise the law and practice surrounding FAIs. The Scottish Government [responded](#) to the Cullen Review in 2011.

The main issues covered in the Cullen Review were:

- extending the grounds for mandatory inquiries
- enabling FAIs to be held where someone has died abroad and the body is repatriated to Scotland.
- properly resourcing COPFS to carry out FAI work and establishing a central team to co-ordinate support and collect performance information

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<sup>3</sup> From Stair Memorial Encyclopaedia: Human Rights, paragraph 47.

<sup>4</sup> Kenney v Lord Advocate [2008] CSOH 21; Emms v Lord Advocate [2011] CSIH 7.

- improving the procedure at FAIs to minimise delays – including using preliminary hearing to set timescales and agree evidence
- improving the experience of the deceased’s relatives by providing more support and information
- making legal aid available to relatives of the deceased if they met the financial eligibility criteria, without the need to justify whether it was “reasonable” to grant it
- making sheriffs’ determinations more effective by, for example, publishing them and requiring organisations to respond to them
- allowing an FAI to be re-opened, or a new one to be held, if fresh evidence became available.

The Scottish Government states that those recommendations which can be taken forward administratively have been implemented – for example, creating a central team at COPFS. Those recommendations which require primary legislation, and with which the Scottish Government agrees, are being taken forward in the Bill. Some recommendations, such as the way court buildings are used, are within the remit of other organisations.

However, there are several of Lord Cullen’s recommendations which the Scottish Government will not be taking forward. These are discussed below.

### **Extending the mandatory categories of FAI**

Lord Cullen recommended that the mandatory categories of FAI were extended to include children who die in “secure accommodation”. This was considered to be a form of legal custody. This is being taken forward in the Bill.

Secure accommodation is accommodation in a residential establishment (which may be provided by a local authority or a third party) where a child’s liberty is restricted. Children are placed in secure accommodation as a result of a Children’s Hearing. Children may be referred to a Children’s Hearing because they have committed an offence or because there are concerns about the child’s welfare.

Lord Cullen also recommended that the death of a child in a residential establishment should trigger an FAI. Children may be in a residential establishment because there is no one to care for them at home or because they have complex disabilities.

More generally, Lord Cullen recommended that there should be a mandatory FAI into the death of any person who is subject to compulsory detention by a public authority at the time of death. This would include people detained under mental health legislation in a variety of settings.

The Scottish Government stated in its response to the Cullen Review (2011) that it did not agree with holding compulsory FAIs in such a wide range of cases. It argued that such an extension would lead to unnecessary hearings where there is no likelihood of learning anything useful. Instead, it proposed that the requirement for an independent investigation into such deaths (created by the European Convention on Human Rights discussed above) can be satisfied in other ways.

In its [consultation paper](#) on the Bill proposals (2014a), the Scottish Government put forward two options for meeting the requirement:

- An investigation by the procurator fiscal, with the discretion to hold an FAI if this was considered in the public interest (generally following the current system).
- An investigation by another public authority, such as the Mental Welfare Commission or a different health board.

Respondents appeared to favour investigation by the procurator fiscal (Scottish Government 2014b, see table 6). Twenty respondents agreed with this proposal, in comparison to eight who disagreed and 29 who did not provide a clear view. Thirteen respondents responded positively to the option of an investigation by another public body, with 17 disagreeing and 29 not providing a clear view.

### **Early application for an FAI**

Lord Cullen recommended that, where an FAI was mandatory, the procurator fiscal should be required to apply for one soon after the death – and not later than three months after. He suggested that, at such an early hearing, the procurator fiscal would be expected to provide information about the investigation so far. The procurator fiscal would also outline the likely timescale for holding an FAI, including factors, such as a prosecution, which might affect this. The hearing would then be continued to an appropriate date in the future.

Lord Cullen thought that such a hearing would be useful for keeping relatives up to date with progress. He also thought it would focus attention on ensuring FAIs were held as quickly as possible.

The Policy Memorandum (page 5) states that it is “not being taken forward due to need to consider criminal proceedings”. The Scottish Government argues (2015) that the process proposed by Lord Cullen would not necessarily allow enough time to gather the information required to decide whether an FAI should be held. This, in turn, would lead to the procurator fiscal applying for a number of unnecessary FAIs. FAI hearings in these situations would, ultimately, not proceed because the circumstances of the death would be adequately established in related criminal proceedings.

The consultation paper (2014a) noted that the Lord Advocate had instructed COPFS to apply for an FAI within two months of a decision being made to hold one. However, this will usually be after any criminal proceedings have been concluded and may be some time after the death.

### **Legal aid for relatives at an FAI**

Relatives can lead evidence or cross-examine witnesses at an FAI. Many will choose to be legally represented to enable this to happen. It is possible to apply for legal aid to cover some of the costs associated with this. The SPICe briefing [Legal Aid](#) (Bremner 2011) provides more information on the legal aid system.

Civil Legal Aid is available subject to three main tests:

- that the applicant meets the financial eligibility criteria
- that there is “probable cause” (or a plausible legal basis) for the claim, and
- that it is “reasonable in the particular circumstances of the case” to grant legal aid.

The Scottish Legal Aid Board (SLAB), the body responsible for administering legal aid applications, produces [online guidance](#) about the process. Those who are entitled to participate in an FAI (such as a spouse or employer) are assumed to have probable cause.

However, applicants have to demonstrate that it would be reasonable for legal aid to be granted. SLAB expects that the procurator fiscal will usually be able to represent the interests of the relatives, except where the deceased died in prison. Applicants for legal aid therefore have to demonstrate why this will not be the case in their situation (SLAB paragraph 4.98).

Lord Cullen took the view that the procurator fiscal was independent of any party at an FAI, even although they may sometimes ask questions on behalf of the relatives. He stated (2009, paragraph 6.39):

“The role of the procurator fiscal is to represent to the court any matter affecting the public interest, whether or not it coincides with the private interest of the relatives.”

He therefore recommended that relatives no longer had to justify the reasonableness of separate representation at an FAI. He also suggested that Scottish Ministers should consider introducing more generous financial eligibility criteria in FAI cases.

The Scottish Government did not accept this recommendation. It stated (2011) that the need to reduce the legal aid budget while maintaining access to justice as far as possible would not be served by removing a key test in the case of FAIs. The Scottish Government also noted that, where the relatives did have a clear interest which would not be taken forward by the procurator fiscal, then it was likely that the reasonableness test would be met.

### **Publication of responses to sheriff recommendations**

In order to make sheriffs' determinations more effective, Lord Cullen recommended that those organisations or individuals who were the subject of recommendations should be under a duty to respond. He also recommended that the responses were published on the Scottish Government website and detailed in an annual report.

The Scottish Government rejected the recommendation to publicise responses to sheriffs' determinations in the manner put forward by Lord Cullen.

Lord Cullen responded to the Scottish Government consultation on the Bill (2014). He emphasised the importance he placed on a requirement to publicise responses. This was so that they were brought to the attention of those responsible for safety, and that the public could see that recommendations were having an effect. He suggested that, if the Scottish Government could not take on the task, then SCTS should publish responses to recommendations alongside the original determination.

The Bill proposes that SCTS would be under an obligation to publish responses to sheriffs' recommendations.

## **PREVIOUS SCOTTISH PARLIAMENT ENGAGEMENT**

The Scottish Parliament has taken an active interest in FAIs over its lifetime. The Scottish Government's announcement that Lord Cullen was to lead a review into existing legislation was followed by a [plenary debate \(27 March 2008\)](#). The main issues covered in that debate were:

- the need for FAIs to be extended so that the deaths of Scottish-based military personnel who die abroad could be investigated more effectively
- the need for the process to more closely align with interests of bereaved families
- the need to ensure that sheriffs' determinations were acted upon

- the problem of delays, with some MSPs expressing concern about the resourcing of COPFS
- whether legal aid should be more easily available to bereaved families, and
- the need to consider whether there should be more mandatory categories of FAI.

The Scottish Parliament has also considered a number of petitions on the issue of FAIs. The petitions and the main concerns of the petitioner are listed in the table below.

Petition details	Main concerns	Action
PE 1567 (27 April 2015) calls for changes to the way unascertained deaths, suicides and fatal accidents are handled.	<ul style="list-style-type: none"> <li>• that not enough is done to learn lessons from deaths where the cause of death is categorised as unascertained</li> </ul>	Petitioner wants a system to appeal or review a COPFS decision to categorise the cause of death as unascertained or suicide. She also wants families to be more included in the decision-making process.
PE 1501 (13 December 2013) calls for a mandatory inquiry into deaths judged to be self-inflicted or accidental.	<ul style="list-style-type: none"> <li>• that it is not possible for families to effectively challenge a COPFS decision, following a death investigation, that a death is likely to have been self-inflicted or accidental</li> </ul>	The petitioner's proposals have developed during the course of the petition. The most recent submission (Graham, S. 2015) calls for families to have access to all the evidence gathered by the police or COPFS as part of any investigation.

Petition details	Main concerns	Action
PE 1280 (5 September 2009) calls for FAIs to be held when a person from Scotland dies abroad.	<ul style="list-style-type: none"> <li>that the 1976 Act does not allow FAIs to be held when someone dies outside Scotland, meaning that there may be no investigation into their death</li> </ul>	Petitioner wants the 1976 Act to be amended to require an FAI to be held when a person from Scotland dies abroad.
PE 1332 (4 June 2010) called for COPFS to be able to investigate suspicious deaths retrospectively.	<ul style="list-style-type: none"> <li>that there is no publically accessible investigation into some deaths, even where the circumstances are suspicious</li> </ul>	Petition closed after COPFS confirmed that it will investigate suspicious deaths where there is new evidence.
PE 841 (21 April 2005) called for the 1976 Act to be amended to require mandatory FAIs in the case of deaths caused by careless driving.	<ul style="list-style-type: none"> <li>that lessons could be learned from road deaths if FAIs were conducted</li> </ul>	Petition closed after the Justice 1 Committee wrote to the Lord Advocate asking for more information about the petitioner's concerns.
PE 767 (14 September 2004) called for a review of the effectiveness of the 1976 Act.	<ul style="list-style-type: none"> <li>that recommendations made by a sheriff have no legal standing and therefore may not be implemented</li> </ul>	Petition closed after Scottish Government announced Cullen Review.
PE 324 (11 December 2000) called for an FAI to be held into a particular death, and for a right of appeal against the Lord Advocate's decision not to hold an FAI.	<ul style="list-style-type: none"> <li>that there was no way to challenge the Lord Advocate's decision not to hold an FAI</li> </ul>	Petition closed after Justice 2 Committee agreed that issues raised would be investigated as part of its inquiry into COPFS.

## PROPOSALS FOR A MEMBER'S BILL FROM PATRICIA FERGUSON

Patricia Ferguson MSP has secured the right to introduce a Member's Bill reforming FAI legislation. However, a final bill has not yet been put forward. Her final proposal is as follows (Scottish Parliament online):

“Proposal for a Bill to re-enact with amendments the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976:

(a) to extend the scope of inquiries to cover work-related deaths not resulting from accidents (such as deaths from industrial diseases and deaths resulting from exposure at work to certain substances), deaths of persons receiving compulsory mental health treatment and deaths of children subject to a child protection order;

(b) to refer appropriate cases to specialist sheriff courts, to give the families of the deceased person a more central role in the process, and to provide that recommendations made by the sheriff are enforceable in certain circumstances and subject to appeal.”

Rule 9.14.13 of the [Scottish Parliament's procedural rules](#) enables the Scottish Government to prevent a Member's Bill from proceeding. This can happen where the Scottish Government notifies the member that it intends to bring forward legislation to give effect to the member's final proposal during that Session. The Scottish Government has not given notice in relation to Patricia Ferguson's proposed Member's Bill.

Ms Ferguson has [consulted](#) (Ferguson, P. 2013) on her proposals and produced an [analysis of the responses](#) (Ferguson, P. 2014). A draft bill is included in the consultation document although Ms Ferguson has noted that some of its provisions will be altered as a result of the consultation exercise.

Ms Ferguson states (2013) that the purpose of her proposed Member's Bill is:

- to put the families of victims at the heart of the FAI process, and
- to ensure an FAI's role in preventing future accidents through recommendations is given equal prominence to its role in establishing the cause of death.

The proposed Member's Bill would achieve these purposes by re-enacting current FAI legislation with a number of amendments. The changes proposed are summarised below.

- extending the mandatory categories of FAI to cover all work-related deaths as well as some other categories,
- requiring the Lord Advocate to give written reasons for a decision not to hold an FAI,
- creating time limits for the Lord Advocate to apply for FAIs with the intention of speeding up the process,
- strengthening the process for sheriffs' recommendations, including making them legally enforceable in certain circumstances, and
- clarifying the role of FAIs in preventing future deaths.

## THE SCOTTISH GOVERNMENT BILL

The Scottish Government states (Policy Memorandum, paragraph 2) that the policy objective behind the Bill is to reform and modernise the law in relation to FAIs. It is part of the Scottish Government's "[Making Justice Work](#)" initiative. This aims to deliver high quality, affordable and accessible justice in Scotland.

The Scottish Government [consulted](#) on the proposals which informed the Bill in 2014 (2014a). An [analysis of responses](#) to the consultation (Scottish Government 2014b) is also available. Consultation responses from those organisations which agreed to their details being made public can be accessed on the [Scottish Government's website](#).

## MANDATORY FAIS

### Proposals in the Bill

Section 2 of the Bill would require a mandatory FAI to be held where a death occurs as a result of an accident at work or in legal custody. The definition of legal custody would be updated to ensure that any death while someone is detained by the police – in any location – is covered. It would also explicitly include children who die while being kept in secure accommodation (defined above).

The Financial Memorandum which accompanies the Bill acknowledges that it is difficult to predict the impact of the Bill's provisions on the number of FAIs to be held. This is because the number of FAIs held fluctuates considerably from year to year (Financial Memorandum, paragraph 12). It is expected that requiring a mandatory FAI where a child dies in secure accommodation will result in no more than one or two extra FAIs every few years (Financial Memorandum, paragraph 38).

### *The Cullen Review*

The Cullen Review recommended that the death of any child looked after in a "residential establishment" (see above) should trigger a mandatory FAI. This would include children in care for a variety of reasons, including because they had complex disabilities. The Cullen Review also recommended that mandatory FAIs should be held where someone is, at the time of their death, subject to compulsory detention by a public authority.

### *Consultation*

A majority of respondents to the Scottish Government consultation (2014a) agreed with the Scottish Government's proposals, although a significant number did not express a view.

Respondents were divided in relation to the Scottish Government's position that deaths of children in "residential childcare" should not trigger a mandatory FAI. "Residential childcare" would appear to include boarding schools and would therefore be significantly wider than Lord Cullen's original proposal (see above). Twenty-one respondents agreed that FAIs should not be mandatory in these circumstances. Eleven disagreed while 25 did not express a view.

## **Patricia Ferguson's proposals**

Patricia Ferguson's proposed Member's Bill would extend the circumstances when a work-related death triggers a mandatory FAI. These would include deaths from industrial diseases (for example, emphysema, asbestosis and certain cancers). Deaths from work-related exposure to hazardous substances (covering radiation and certain chemicals) would also result in a mandatory FAI.

In addition, Patricia Ferguson's proposed Member's Bill would require a mandatory FAI where a child who was the subject of a child protection order dies. A child protection order is an emergency order which may require a child to be taken to a place of safety. A mandatory FAI would also be held where someone receiving compulsory mental health treatment, or who is under quarantine for public health reasons, dies.

## **DISCRETIONARY FAIS**

### **Proposals in the Bill**

Section 4 of the Bill would maintain the current provision for discretionary FAIs where the Lord Advocate considers that "it is in the public interest for an inquiry to be held".

Section 6 would enable a discretionary FAI to be held where a death occurs outside the UK. This would be possible where:

- the deceased was ordinarily resident in Scotland at the time of death, and
- the person's body is repatriated to Scotland.

The Lord Advocate would exercise his discretion in relation to whether an FAI should be held on the basis of the following criteria:

- that the circumstances of the death had not been sufficiently established in other investigations
- that there was a real prospect that those circumstances would be established at an FAI, and
- that it is in public interest for an inquiry to be held.

Section 7 would make separate provision for the deaths of service personnel. It would re-enact the existing law (described above).

The Financial Memorandum estimates that the ability to hold FAIs into deaths which occur outside the UK will generate no more than one extra FAI per year (Financial Memorandum, paragraph 53). COPFS also estimates it will carry out a maximum of 50 additional death investigations as a result of the proposals. The additional cost of investigating these deaths is estimated to be around £157,350 per year.

#### *The Cullen Review*

The proposals in the Bill are in line with the recommendations made by Lord Cullen in this area.

#### *Consultation*

Again, a majority of respondents to the Scottish Government's consultation (2014a) supported the Scottish Government's proposals. However, a significant number of respondents did not express a view. For the small number of respondents who commented on the proposals, there was concern as to how the criteria outlined in the Bill would be assessed in practice.

### **Patricia Ferguson's proposals**

Patricia Ferguson's proposed Member's Bill would also extend FAIs to deaths where the body is repatriated to Scotland.

## **ROLE OF THE FAMILY**

### **Proposals in the Bill**

The support currently provided by COPFS to family members is discussed above.

Section 8 of the Bill would create a duty on the Lord Advocate to provide written reasons for a decision not to hold an FAI, but only where requested to do so by the nearest relative. It would remain open to COPFS staff to explain the decision to the family informally if that was more appropriate in the circumstances.

#### *The Cullen Review*

The proposals in the Bill follow Lord Cullen's recommendations on this matter.

#### *Consultation*

This proposal was not consulted on.

## Patricia Ferguson's proposals

Patricia Ferguson's proposed Member's Bill contains similar proposals. The draft bill would require the Lord Advocate to notify a range of interested parties of the reasons for reaching a decision not to hold an FAI. He would also be required to notify interested parties in other circumstances, such as when the decision to hold an FAI is reached or the impact of criminal proceedings on a prospective FAI.

Ms Ferguson's proposed bill would also give the family a right to request that an FAI is held in the specialist personal injury court, unless the Lord Advocate can show good cause for not doing so<sup>5</sup>. The specialist personal injury court is a sheriff court that deals only with personal injury matters. It is to be presided over by sheriffs with specialist knowledge of this area of law. It is expected to be based in Edinburgh.

## DEALING WITH DELAYS

### Proposals in the Bill

Section 14 of the Bill would require the sheriff to "have regard to the desirability of holding the inquiry as soon as is reasonably practicable" when fixing a date for an FAI to start.

Section 15 would create provision for a preliminary hearing to take place before the start of any FAI. The preliminary hearing would deal with a range of procedural issues. These, and the circumstances in which a sheriff can dispense with a preliminary hearing, are to be dealt with in detail in court rules. Lord Cullen argued that a preliminary hearing could be a useful tool in ensuring that an FAI was conducted in an effective and efficient manner.

Lord Cullen also envisaged that the preliminary hearing would provide a forum for the parties to share evidence and witness statements. This would facilitate agreement over the scope of the FAI and whether any matters could be agreed between the parties in advance. Section 17 of the Bill makes general provision for this.

### *The Cullen Review*

Lord Cullen recommended that preliminary hearings should be standard procedure for FAIs. This is taken forward in the Bill. He also recommended that, in the case of mandatory FAIs, there should be an early hearing. This is not being taken forward.

Lord Cullen made a number of recommendations designed to ensure that COPFS was able to direct appropriate financial and staff resources to supporting FAIs. The Scottish Government states that recommendations around creating a central team within COPFS with responsibility for case management have been taken forward (Policy Memorandum, paragraphs 29 to 33). However, the position regarding financial resources is not clear.

### *Consultation*

The vast majority of respondents to the Scottish Government consultation (2014a) agreed with the proposal to hold preliminary hearings. There was also significant support for the view that it was unrealistic to create deadlines for the holding of FAIs due to the diversity of circumstances. However, consultees expressed on-going concerns about delays in relation to FAIs. A range of suggestions were made to address this.

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<sup>5</sup> Note that the Scottish Government Bill would allow sheriffs to be designated as specialists in conducting FAIs.

The Scottish Government consulted on a number of other proposals intended to speed up FAIs. These all received general support and included:

- having pre-hearing meetings of experts
- allowing written evidence statements to be submitted to the sheriff in advance of the FAI, and
- hearing some business in sheriffs' chambers (i.e. not in public).

### **Patricia Ferguson's proposals**

Patricia Ferguson's proposed Member's Bill also contains a number of proposals to deal with delays. It would create specific deadlines for the holding of FAIs. These have changed since the draft bill was produced (Ferguson, P. 2015).

Under the most recent proposal (Ferguson, P. 2015), the Lord Advocate (through COPFS) would usually be required to notify relatives of whether an FAI would be held within six months of becoming aware of a death. He would then have a further three months to apply for the FAI.

There are parallel proposal for situations where criminal proceedings or other investigations are taking place. In these circumstances, the Lord Advocate would be required to notify relatives of his decision on whether to hold an FAI within three months of proceedings concluding. He would then have a further three months to apply for the FAI.

Where the Lord Advocate was not able to meet these deadlines, it would be possible for him to set a later date. He would be required to notify interested parties of the date and of the reasons why the FAI could not be held sooner.

Patricia Ferguson's proposed Member's Bill would also make provision for preliminary hearings to deal with procedural issues. A preliminary hearing would be required to take place no later than three months after an application for an FAI.

## **SHERIFFS' DETERMINATIONS**

### **Proposals in the Bill**

The Bill would update the current law governing the scope of the sheriff's determination in order to deal with a number of concerns highlighted by Lord Cullen.

Section 25 of the Bill details the proposed matters which the sheriff's determination would cover. These are:

- when and where the death occurred
- when and where any accident resulting in the death occurred
- the cause(s) of death
- the cause(s) of any accident resulting in the death
- any precautions which could reasonably have been taken and which might realistically have resulted in the death being avoided

- any defects in any system of working which contributed to the death or any accident resulting in the death
- any other relevant facts.

Recommendations would be able to be made to participants at the FAI and to organisations or people with an interest in the prevention of deaths in similar circumstances (whether or not they participated in the inquiry).

Section 25 would also make clear recommendations can be made in relation to precautions and defects, even where it would not have been reasonably foreseeable that they would have prevented, or contributed to, the death. Section 25 distinguishes between precautions which may have prevented the death which is the subject of the inquiry (subsection (2) and those which might prevent deaths in the future in similar circumstances (subsection (4)).

Section 26 would create an obligation on SCTS to publish all sheriffs' determinations. A copy of such a determination would also be supplied to each participant at the FAI and each person or organisation to whom a recommendation is made. Other people and organisations would be entitled to receive a copy of the determination.

Section 27 deals with provisions to require compliance with the sheriff's recommendations. Where a recommendation is addressed to a party to the FAI, they would be required to respond to SCTS within 8 weeks of receiving a copy of the determination. The response would set out how the recommendation was being dealt with. Where the respondent did not intend to implement the recommendation (or implement it in full) the response would be required to set out the reasons for that.

Where a recommendation is addressed to an organisation or person who did not participate in the FAI, they would not be obliged to respond, but could choose to do so.

SCTS would be responsible for publishing responses (although it would be possible for certain information to be withheld). Where an organisation or person does not respond, SCTS would publish notice of that fact.

The Financial Memorandum does not provide details of the costs expected to fall on SCTS as a result of these provisions. However, it does state that these costs are not expected to be significant (Financial Memorandum, paragraph 74).

### *The Cullen Review*

The Bill largely follows Lord Cullen's recommendations for publishing and following-up determinations and recommendations. Lord Cullen originally envisaged that the Sco

tish Government would take on the administration involved. He responded (2014) to the Scottish Government consultation on the Bill to emphasise the importance he attached to the publication of responses to sheriffs' recommendations. The Bill places this duty on SCTS.

### *Consultation*

There was wide support for the Scottish Government consultation proposal (2014a) that all sheriffs' determinations should appear on the SCTS website. There was also broad support for the dissemination of recommendations to interested parties.

The Scottish Government consultation envisaged that sheriffs would co-ordinate responses to recommendations. A majority of respondents supported this proposition. However, a minority, including several legal bodies and sheriff groups, disagreed.

They argued that it was not appropriate for sheriffs to carry out this task. Some also suggested that sheriffs did not have the resources to allow them to undertake this work. The proposals in the Bill therefore pass responsibility for this follow-up work to SCTS.

### **Patricia Ferguson's proposals**

Patricia Ferguson's proposed Member's Bill contains provisions which would make sheriffs' recommendations legally enforceable. The Lord Advocate would be responsible for highlighting any failures to implement recommendations to the sheriff. The sheriff would have the power to hold a hearing to determine the reasons for the failure.

The sheriff would be able to make an order in relation to implementation after such a hearing. This could take into account views of the parties to the hearing, e.g. in relation to the practicality of implementing the recommendation. It would be an offence not to comply with such an order.

### **OTHER MATTERS**

The Bill would make other changes to the current law in relation to FAIs. These include:

- provisions which would enable FAIs to be held in a sheriffdom which was not the one most closely associated with the death concerned - this may ease the burden on families where an accident occurs far from home. It may also help efficient court programming
- provisions which would allow more FAIs to be held outwith court buildings
- provisions which would allow FAIs to be re-opened or entirely reconvened where new evidence comes to light
- provisions which would enable the new summary sheriffs (created by the Courts Reform (Scotland) Act 2014) to deal with more straightforward FAIs
- provisions which would allow sheriffs to be designated as specialists in FAIs.

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SB 09-75 [Judicial Review](#) (399KB)

SB 11-58 [Legal Aid](#) (707KB)

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